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Brian Edward Brooker

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EXAMINER

BEKKER, KELLY JO

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/525,189  
Filing Date: November 07, 2005  
Appellant(s): BROOKER ET AL.

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Salvatore Sidoti  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed November 2, 2010 appealing from the Office action mailed July 1, 2010.

**(1) Real Party in Interest**

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

Claims 22-39 and 41 are pending and rejected.

**(4) Status of Amendments After Final**

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

**(5) Summary of Claimed Subject Matter**

The examiner has no comment on the summary of claimed subject matter contained in the brief.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

### **(7) Claims Appendix**

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

### **(8) Evidence Relied Upon**

EP 0147483	DELANEY et al	07-1985
US 2001/0038872 A1	Brooker	11-2001
US 4,012,533	Jonas	03-1977

### **(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claim 41 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention.

Claim 41 recites, "The method according to claim 23, wherein the dispersion is provided below ambient temperature for gasification and freezing". The term "ambient temperature" is a relative term which renders the claim indefinite. The term "ambient temperature" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unclear if the ambient temperature is an unspecified freezing temperature, or a storage temperature, or some other bench mark temperature and as to what said temperature is. For example, it is unclear as to if the ambient temperature is 30C or 0C or some other temperature. While Appellant provides an example of sub-ambient temperature for freezing, specification page 6, 10-15C, there is no guidance or definition in the disclosure for distinctly determining the temperature; the metes and the bounds of the claimed term are unclear. Another example showing the lack of clarity in claim 41 is appellant's remarks, page 4 filed April 13, 2010, in which Appellant argued that the term "ambient temperature" would be definite to one of ordinary skill in the art as the specification states "ambient temperature, or the temperature of the ice cream making process"

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(Specification page 3 lines 25-28). The statement in the specification which Appellant refers to can be interpreted as one temperature or as two separate temperatures, one temperature which is ambient temperature, and the second temperature which is the temperature of the ice cream making process, however, even if the ambient temperature is the temperature of the ice cream making process, as argued by Appellant in the April 13, 2010 remarks, it is unclear as to what step the temperature would be applicable; for example, in an ice cream making process ingredients are mixed at 50-60C, cooled at 4C, and frozen at -30 to -40C (specification pages 1-2); if ambient temperature is the temperature of the ice cream making process it is unclear as to if ambient temperature would be from 60C to -40C or 50-60C or about 4C or about -30C to -40C. Appellant now argues that the term “ambient temperature” means the temperature for gasification and freezing (Brief page 16). Thus, appellants have further supported the position of the office in demonstrating that the term “ambient temperature” does not have a definite meaning. Furthermore, in the instant claim language, it is unclear as to if the term “for gasification and freezing” is in relation to “providing of the dispersion” or “ambient temperature”; and in regards to “for gasification and freezing” in relation to “ambient temperature” it is unclear as to what the ambient temperature for gasification and freezing is; it is unclear as to if the “below ambient temperature” for gasification and freezing would be any temperature below the freezing point of the ice cream, or if the temperature would be below some specific temperature during gasification and freezing, etc.

Claims 23-33, 37, 39, and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Delany (EP 0147483) in view of Brooker (US 2001/0038872 A1).

Delany teaches a method of making ice cream comprising homogenizing a mix of ingredients, aging the mix to crystallize particles of edible fat which each contain a multiplicity of individual crystals so as to form a dispersion, then gasifying, and freezing the dispersion so as to form an ice cream (abstract and page 5 line 13 through page 6 line 15). As Delany teaches that the fat is crystallized prior to gasification and freezing,

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Delany teaches that the fat is precrystallized, i.e. crystallized before. Delany teaches that the mix comprises an emulsifier, including monoglycerides, sugar, non-fat milk solids (NFMS), and hydrogenated vegetable oil (page 9 lines 2-7, page 12 lines 26-29, page 16 lines 31-34, and page 17 lines 20-21). Delany teaches that the mix may be pasteurized before homogenization and aging, which is before the fat is precrystallized (page 13 lines 1-2). Delany teaches that the fat emulsion diameter is 1.8-21 microns, which is 1.8-21 micrometers (page 10 all). Delany teaches that the precrystallized particles of edible fat take the form of a globule comprising a mass of crystals of fat (page 7 lines 15-34). Delany teaches that it is desirable for small fat crystals to be formed in the ice cream because small fat crystals remain in the product when the product is exposed to room temperature, thus obtaining products with less iciness, a smoother texture, better overrun better exposed to heat shock, and which has improved shelf life stability (page 7 lines 15-34, page 13 lines 12-22, and page 2 lines 14-24). Delany teaches that the mixture is homogenized to reduce the size of the fat globules (page 9 lines 30-32). Delany teaches that the mixture is aged for 2-12 hours to form crystallization of the fat (page 13 lines 12-22). Delany teaches that the fat is injected into an aqueous mix, i.e. an aqueous ice cream precursor phase containing the other ice cream ingredients (page 9 lines 26-30). Delany teaches that the emulsifiers are combined with the fat prior to the fat being precrystallized or combined with the other ice cream ingredients (page 12 lines 26-34). Specifically regarding claim 41, as discussed above the claim limitations are unclear, however, as Appellant gives an example of the ambient temperature as 10-15C (specification page 6), and as Delany, page 18 line 13 through page 19 line 6, teaches that the dispersion of fat and ice cream precursors are provided at 30-40F (which is -1.1C to 4.4C) before aging, which is prior to gasification and freezing, it is believed that Delany teaches the dispersion as provided below ambient temperature as instantly claimed.

Delany is silent to the dispersion as gasified and frozen without being subject to homogenization or aging, to the edible fat particles as precrystallized cryogenically, and to the precrystallized fat as blended with an aqueous ice cream precursor phase as recited in claim 23, to the liquid cryogen as directed at fine particles of edible fat in a

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molten state as recited in claim 24, wherein the liquid cryogen is a spray as recited in claim 25, to the liquid cryogen as nitrogen as recited in claim 26, to the precrystallized fat globules as entrapped with pockets of oil as recited in claim 27, to the ice cream precursor phase as pasteurized before being blended with the fat particles as recited in claim 32.

Brooker teaches a method of forming a food product which includes hydrogenated fat (abstract). Brooker teaches that the food composition or the fat which is later added to the food composition are in liquid spray form and are contacted with cryogen so as to cool the liquid product, thus forming prercrystallized fat (paragraphs 0010 and 0018). Brooker teaches that the cryogen is sprayed in liquid form (paragraphs 0031 and 0032). Brooker teaches that the main aim of the invention is to provide small crystals of liquid fat corresponding to a large number of these crystals dispersed in a liquid phase of the fat structure (paragraph 0011). Brooker teaches that the product produced has a minimum crystal size, including a crystal size ideally less than 0.1 micron and that the final product with the fat crystals has an improved uniformity (paragraphs 0007, 0016, 0017, and 0022). Brooker teaches that the method saves time and cost as no additional time is needed for crystallization to continue over an extended period of time, i.e. aging, (paragraphs 0008, 0020, and 0021). Brooker teaches that the spray of liquid fat is advantageously formed by atomization, preferably by urging the liquid fat through an atomizing nozzle in communication with an external source of gas, including nitrogen (paragraph 0013).

Regarding the edible fat particles as precrystallized cryogenically, wherein liquid cryogen nitrogen is sprayed and is directed at fine particles of edible fat in a molten state and the precrystallized fat globules have entrapped with pockets of oil, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use the precrystallized particles of fat as taught by Brooker, which were precrystallized cryogenically wherein liquid cryogen nitrogen is sprayed and is directed at fine particles of edible fat in a molten state in the ice cream taught by Delany. One would have been motivated to do so because Delany teaches that it is desirable to have small crystallized particles of fat in the ice cream and because Brooker teaches of a

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method of forming a precrystallized fat with minimal crystallize size, and using the fat forms a more uniform product with reduced processing steps. Specifically regarding the precrystallized fat globules as entrapped with pockets of oil, as the fat globules of the Brooker are produced by substantially the same method as the instantly claimed fat globules, one of ordinary skill in the art at the time the invention was made would expect that the fat globules of the Brooker, which are used in the ice cream of Delany, have substantially the same properties as the instantly claimed fat.

Regarding the dispersion as gasified and frozen without being subject to aging, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use the precrystallized particles of fat as taught by Brooker in the ice cream taught by Delany, and thus to process the ice cream without aging. One would have been motivated to do so because Delany teaches that it is desirable to have small crystallized particles of fat in the ice cream, Delany teaches that the ice cream is aged for 2-12 hours for crystallization of the fat, Brooker teaches of a method of forming a precrystallized fat with minimal crystallize size that add improved uniformity in a final product, and Brooker teaches that the fat crystals are formed without the need for aging (which is to produce fat crystals over extended time), thus saving money on processing time and equipment. The exclusion of aging in the product processing of Delany in view of Brooker would not be destroying of the reference as the function of aging, i.e. forming fat crystals, is still accomplished by the method of Brooker; The exclusion of aging is obvious as the prior art, Brooker, clearly establishes that the function of aging, i.e. formation of the fat crystals, is achieved without the recited element, i.e. aging.

Regarding the dispersion as gasified and frozen without being subject to homogenization, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use the precrystallized particles of fat as taught by Brooker in the ice cream taught by Delany, and thus to process the ice cream without homogenization. One would have been motivated to do so because Delany teaches that it is desirable to have small crystallized particles of fat in the ice cream, Delany teaches that the ice cream is homogenized to reduce the size of the fat globules, and because Brooker teaches of a method of forming a precrystallized fat with minimal



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crystallize size that add improved uniformity in a final product and as the fat crystals are formed without the need for homogenizing (which is to reduce the size of the fat), thus saving money on processing time and equipment. The exclusion of homogenization in the product processing of Delany in view of Brooker would not be destroying of the reference as the function of homogenization, i.e. forming reduced size fat globules, is still accomplished by the method of Brooker; The exclusion of homogenization is obvious as the prior art, Brooker, clearly establishes that the function of homogenization, i.e. reduced fat crystal size, is achieved without the recited element, i.e. homogenization.

Regarding the precrystallized fat as blended with an aqueous ice cream precursor phase, it would have been obvious to one of ordinary skill in the art at the time the invention was made to precrystallize the fat and emulsifier prior to blending with the other food ingredients, including the other ice cream ingredients combined, which would form an ice cream precursor phase, as taught by Delany in view of Brooker. As Brooker teaches that the precrystallized fat may be used in a plurality of foods, one of ordinary skill in the art would have been motivated to first precrystallize the fat and emulsifier, before adding the fat to product specific ingredients, such as an ice cream precursor phase, so that the precrystallized particles were available for use in a variety of foods, and not just ice cream; and it would have been obvious to one of ordinary skill in the art at the time the invention was made to mix and pre-homogenize the other ingredients since the precrystallized fat is able to form a homogenized product without being homogenized, as taught by Brooker. Furthermore, to switch the order of performing process steps, i.e. the order of the addition of the ingredients into the final mixture, would be obvious absent any clear and convincing evidence and/or arguments to the contrary (MPEP 2144.04 [R-1]). "Selection of any order of performing process steps is prima facie obvious in the absence of new or unexpected results". One of ordinary skill in the art would expect that to precrystallize the fat prior to or after blending with the other food ingredients would not provide for new or unexpected results as both form precrystallized particles of fat prior to processing steps, such as and including

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gasification, freezing, etc; the switched order is simply a difference in the order of addition of the ingredients prior to processing.

Regarding the ice cream precursor phase as pasteurized before being blended with the fat particles, Delany teaches that the mix is pasteurized before the fat is precrystallized and since the method of Delany in view of Brooker forms the precrystallized fat prior to mixing with the ice cream precursor phase, it would have been obvious to one of ordinary skill in the art at the time the invention was to pasteurize the mix or ice cream precursor phase prior to being blended with the precrystallized fat particles. Furthermore, as pasteurization was known to occur at high temperatures, as precrystallization is a freezing step, and as the final product is frozen, it would have been obvious and common sense to first apply the heating steps, such as pasteurization, and then the cooling steps, such as precrystallization in order to save energy from less heat transfer and prevent the fat crystals from heat damage.

Claims 34-36 and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Delany (EP 0147483) in view of Brooker (US 2001/0038872 A1), further in view of Jonas (US 4012533).

Delany in view of Brooker teaches of a method of making ice cream comprising precrystallized particles of edible fat and emulsifiers, including monoglycerides as discussed above. The references are silent to the emulsifier as a lipophilic emulsifier as recited in claim 34, including saturated monoglycerides as recited in claim 35, preferably a glycerol monostearate as recited in claim 36 and to the emulsifier as surface active and water soluble as recited in claim 38.

Jonas teaches of an ice cream type products (abstract). Jonas teaches that selection of a particular emulsifier for a fat protein system, such as the ice cream taught by Delany, may be readily determined by those skilled in the art depending on the physical properties desired in the finished product (Column 4 lines 35-40). Jonas teaches that a monoglycerides and/or SPANS, i.e. a glycerol monostearate which is a saturated monoglyceride, is used when the fat and protein emulsions are mixed and directly whipped.

Regarding the emulsifier as a lipophilic emulsifier, including the saturated monoglyceride, preferably a glycerol monostearate which is surface active and water soluble, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use a particular emulsifier in the composition of Delany depending on the properties desired in the final product as taught by Jones. To do so would be routine determination and would not impart a patentable distinction to the claims. For example, one would have been motivated to use a glycerol monostearate which is a saturated monoglyceride and a lipophilic emulsifier in the invention as taught by Delany since the fat and protein (contained in NFMS) are mixed and directly whipped, as taught by Jones. One would have been further motivated to use a surface action water soluble emulsifier, which would thus be soluble and able to mix in while adhering to the fats by surface action, in the premix ingredients, in order to form a homogenous dispersion to which the precrystallized fat would be dispersed in. To select well known ingredients for their intended function does not impart a patentable distinction to the claims.

#### **(10) Response to Argument**

Appellant's arguments filed November 2, 2010 in regards to the 112 second paragraph rejection have been fully considered but they are not persuasive.

Appellant argues that the term "ambient temperature" would be definite as the temperature of the ice cream making process just prior to or during gasification and freezing and one of ordinary skill in the art would be reasonably apprised of the scope of the claim. This argument is not convincing as ambient temperature is not defined in the specification and the claim language is unclear as stated above. Furthermore, in the instant claim language, it is unclear as to if the term "for gasification and freezing" is in relation to "providing of the dispersion" or "ambient temperature"; and even if the term is in relation to the "ambient temperature" it is unclear as to what the ambient temperature for gasification and freezing is; it is unclear as to if the "below ambient temperature" for gasification and freezing would be any temperature below the freezing point of the ice

cream, or if the temperature would be below some specific temperature during gasification and freezing, or any temperature “just prior” to gasification and freezing, etc.

Appellant's arguments regarding the prior art rejections filed November 2, 2010 have been fully considered but they are not persuasive.

Appellant argues that Delany does not teach of a pre-crystallized fat particle as defined in the specification, wherein crystallization occurs prior to incorporating the fat into a dispersion of other ingredients. Appellant argues that there is no motivation to precrystallize the fat prior to blending with the other ice cream ingredients. Appellant's argument is not convincing as:

- In response to Appellant's argument that the references fail to show certain features of Appellant's invention, it is noted that the features upon which Appellant relies (i.e. a definition of pre-crystallization which defines the step to which the crystallization is prior to) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). The claims require that the fat be pre-crystallized for a blending step and prior to gasifying and freezing; There is nothing in the claims that requires the claims be pre-crystallized prior to the addition of specific ingredients, such as the emulsifier. In fact, it is noted that Appellant claims mixing the fat with some ingredients, such as an emulsifier, prior to pre-crystallization (claim 33).
- The limitations which are instantly claimed, including the fat as pre-crystallized before gasification and freezing and before being combined with the ice cream precursor phase have been addressed above.
  - Specifically, regarding the fat as precrystallized prior to gasification and freezing, Delany teaches a method of making ice cream comprising homogenizing a mix of ingredients, aging the mix to

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crystallize particles of edible fat to form a dispersion, then gasifying, and freezing the dispersion so as to form an ice cream (abstract and page 5 line 13 through page 6 line 15); As Delany teaches that the fat is crystallized prior to gasification and freezing, Delany teaches that the fat is precrystallized, i.e. crystallized before.

- Specifically regarding precrystallization of the fat, wherein the fat is mixed with an ice cream precursor phase, Delany teaches that the emulsifiers are combined with the fat prior to the fat being precrystallized or combined with the other ice cream ingredients (page 12 lines 26-34), it would have been obvious to one of ordinary skill in the art at the time the invention was made to precrystallize the fat and emulsifier prior to blending with the other food ingredients, including the other ice cream ingredients combined, which would form an ice cream precursor phase, as taught by Delany in view of Brooker. As Brooker teaches that the precrystallized fat may be used in a plurality of foods, one of ordinary skill in the art would have been motivated to first precrystallize the fat and emulsifier, before adding the fat to product specific ingredients, such as an ice cream precursor phase, so that the precrystallized particles were available for use in a variety of foods, and not just ice cream; and it would have been obvious to one of ordinary skill in the art at the time the invention was made to mix and pre-homogenize the other ingredients since the precrystallized fat is able to form a homogenized product without being homogenized, as taught by Brooker.
- Furthermore, to switch the order of performing process steps, i.e. the order of the addition of the ingredients into the final mixture, would be obvious absent any clear and convincing evidence and/or arguments to the contrary (MPEP 2144.04 [R-1]). "Selection of any order of performing process steps is prima facie obvious in the absence of new or unexpected

results". One of ordinary skill in the art would expect that to precrystallize the fat prior to or after blending with the other food ingredients would not provide for new or unexpected results as both form precrystallized particles of fat prior to processing steps, such as and including gasification, freezing, etc; the switched order is simply a difference in the order of addition of the ingredients prior to processing.

- At the present time, Appellant has not provided evidence of new or unexpected results due to the order of the processing steps.

Appellant further argues criticality of the order of processing steps because Delany teaches critical steps. Appellant's argument is not convincing as no criticality is shown in the references regarding the fat as pre-crystallized prior to or after blending with other ingredients.

Appellant argues that Delany teaches of homogenization and aging in the ice cream forming method, which are excluded from the instant claims and that there is no suggestion to remove such processing steps and to do so would destroy the reference as Delany teaches the steps are critical and would be hindsight reconstruction.

Appellant further argues one would not have been motivated to combine the references because to combine Delany and Brooker teaches of eliminating the processing steps of Delany. Appellant's argument is not convincing as:

- It must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the Appellant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).
- The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the

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claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

- The test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).
- In the instant case, motivation is found in some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art and does not include knowledge gleaned only from the Appellant's disclosure.
  - Delany teaches:
    - It is desirable for smaller fat crystals to be formed in the ice cream because smaller fat crystals retain the product when the product is exposed to room temperature, thus obtaining products with less iciness, a smoother texture, better overrun better exposed to heat shock, and which has improved shelf life stability (page 7 lines 15-34, page 13 lines 12-22, and page 2 lines 14-24);
    - The ice cream mixture is homogenized to reduce the size of the fat globules (page 9 lines 30-32);
    - The ice cream mixture is aged for 2-12 hours to form crystallization of the fat (page 13 lines 12-22); and
    - The fat emulsion diameter is 1.8-21 microns (page 10 all).
  - Brooker teaches:
    - A method of forming food products which includes incorporating hydrogenated fat in the foods which has been cryogenically frozen to provide small crystals of liquid fat (paragraphs 0010, 0011, 0018, 0031, and 0032);

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- The food produced has a minimum crystal size, including a crystal size ideally less than 0.1 micron (paragraphs 0007, 0016, 0017, and 0022);
  - The final product with the fat crystals of Brooker has an improved uniformity (paragraphs 0007, 0016, 0017, and 0022); and
  - The method saves time as no additional time is needed for crystallization to continue over an extended period of time, i.e. aging, (paragraphs 0008, 0020, and 0021).
- It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the pre-crystallized particles of fat, which were pre-crystallized cryogenically in the ice cream taught by Delany in view of Brooker. One would have been motivated to do so because Delany teaches that it is desirable to have small crystallized particles of fat in the ice cream and because Brooker teaches of a method of forming a pre-crystallized fat with minimal crystallize size that adds improved uniformity in a final product and because the method of Brooker eliminates the need for aging and homogenization in forming the reduced size fat crystals, thus saving money on processing time and equipment.
  - Regarding the dispersion as gasified and frozen without being subject to homogenization, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the dispersion to be gasified and frozen without being subject to homogenization because:
  - Delany teaches that homogenization is used to reduce the size and form small fat globules of about 1.8-21 microns;
    - Delany teaches that smaller crystals form a better product because they retain when the product is exposed to room temperatures;
    - Brooker teaches that pre-crystallized particles of fat are formed without homogenization at a size of 0.1 microns;



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- It would be common sense to one of ordinary skill in the art that if a processing step could be removed and substantially the same or an improved product could be formed to remove the step would save money on processing time and equipment.
- By using the small pre-crystallized fat particles as taught by Brooker in the ice cream as taught by Delany, the need for homogenization, i.e. for forming small globules of fat, is removed, thus eliminating a processing step and saving on processing time or equipment.
- The exclusion of homogenization in the product processing of Delany in view of Brooker would not be destroying of the reference and would have an expectation of success as the function of homogenization, i.e. forming reduced size fat globules, is still accomplished by the method of Brooker;
- The exclusion of homogenization is obvious as the prior art, Brooker, clearly establishes that the function of homogenization, i.e. reduced fat crystal size, is achieved without the recited element, i.e. homogenization.
- Regarding the dispersion as gasified and frozen without being subject to aging, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the dispersion to be gasified and frozen without being subject to aging because:
  - Delany teaches that aging is utilized to form the small crystallized particles of fat;
  - Brooker teaches that pre-crystallized particles of fat are formed without aging at a size of 0.1 microns;
  - Brooker teaches a method of forming small crystallized particles of fat which saves time, and thus money, as no additional time is needed for crystallization to continue over an extended period of time, i.e. aging

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- It would be common sense to one of ordinary skill in the art that if a processing step could be removed and substantially the same or an improved product could be formed to remove the step would save money on processing time and equipment.
- By using the pre-crystallized fat particles as taught by Brooker in the ice cream as taught by Delany, the need for aging, i.e. for forming crystallized globules of fat, is removed, thus eliminating a processing step and saving on processing time or equipment;
- The product processing of Delany in view of Brooker would not be destroying of the reference and would have an expectation of success as the function of aging, i.e. forming crystallized fat globules, is still accomplished by the method of Brooker.
- The exclusion of aging is obvious as the prior art, Brooker, clearly establishes that the function of aging, i.e. formation of the fat crystals, is achieved without the recited element, i.e. aging.
- Although Delany teaches that the steps of aging and homogenization are critical, Delany teaches the function of the steps is where the criticality lie and as Brooker teaches of different steps which perform the same function, the criticality of the process as taught by Delany is maintained in the combination of Delany in view of Brooker; i.e. Appellant's argument is not convincing as Delany teaches that the criticality is improved stability achieved by selecting a specific oil, homogenizing the mix of ingredients to form an emulsion having a narrow distribution of small diameter fat globules, and aging the emulsion to crystallize the fat globules prior to whipping (abstract), and as the combination of Delany and Brooker maintains the critical function of selecting a specific oil and forming small diameter fat globules which are crystallized prior to whipping.

Appellant argues that the method of Delany is critical and cannot be changed as Delany states on page 1 that it is extremely difficult to reformulate such aerated frozen products in an attempt to provide improvement. Appellant's argument is not convincing as 1) the process claims of Delany in view of Brooker would have been obvious and maintained any criticality as the functions of the process remain the same and as 2) the statement of Delany is referring to a formulation and function and not the method.

Appellant argues that Brooker does not disclose that precrystallized fat can be utilized in frozen food products or ice cream. Appellant's argument is not convincing as (1) Delany clearly establishes that crystallized particles of fat are desirable in frozen confections, specifically ice cream; and (2) Brooker teaches the use of improved crystallized particles of fat for improved food products; and Brooker does not limit the use of the fat to specific foods.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Kelly Bekker

/Kelly Bekker/

Conferees:

/Keith D. Hendricks/

Supervisory Patent Examiner, Art Unit 1781

/Christine Tierney/

Supervisory Patent Examiner, Art Unit 1700